discovery of the fraud can have no bearing upon the right of action for the fraud. There is no reason against allowing an immediate right of action, and there is good reason for it. It is submitted that this is the best solution.

(c) The third solution is to deny him all remedy on the fraud, if he affirms the contract.[5] Of course that does not preclude him from rescinding the contract, and pursuing the remedies then available. In theory, this solution has nothing to support it. In practice, it seems to be adopted by some courts to avoid perplexing questions as to the rule of damages to be followed under either of the other solutions, and by other courts, to meet the assumption that the mere affirmance of the contract amounts *per se* to a waiver of a right to sue on the fraud. It is submitted that both these grounds are bad.

If the above is sound, the conclusion is that the defrauded party should be allowed to sue immediately, without tendering payments not yet due. The reported cases on the point are very few, and are not determinative one way or the other. Nearly all cases in practice may be decided on the basis of some closely related, but better settled, doctrine, as merger with covenants for title, recoupment, rescission, apportionment, implied and express warranties, breach of the contract itself, etc. No doubt the safe course when such a case actually presents itself, is to follow the beaten path, and elect one of the remedies based upon rescission.

O. F. M.

LARCENY BY TRICK: FALSE PRETENSES.—In *People v. Rial*,[1] the prosecuting witness handed his property to the defendant at a poolroom to bet on a horse race, the defendant having advance information of the result. The defendant gave the money to one R. to place with the bookmaker. The usual mistake was made; R. bet to win instead of to place and the money was lost. The poolroom was a fake and all connected with it confederates. On an indictment for larceny the principal defense asserted was that the crime was false pretenses. The defense was properly overruled as the prosecuting witness gave the defendant possession, not property.

The early common law protected a man from having his property taken without his consent, but if he entered into business relations with another and delivered up the possession, even though induced by fraud, there was, generally speaking, no crime committed. As commerce and commercial morality developed, it was

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(1889) 81 Cal. 1, 22 Pac. 515; Marsalis v. Crawford, (1894) 8 Tex. Civ. App. 485, 28 S. W. 371; Minnesota etc. Co. v. Grueben, (1897) 6 Kan. App. 665, 50 Pac. 67; Kingman v. Stoddard, (1898) 85 Fed. 740, 29 C. C. A. 413.

[5] Gifford v. Carvill, (1866) 29 Cal. 590.

[1] (Jan. 23, 1914, rehearing denied by Supreme Court March 23, 1914) 18 Cal. App. Dec. 129, 139 Pac. 661.

felt that the criminal law should protect from fraud in trade. The scope of larceny was therefore extended to the utter confusion of logic, culminating in the well known distinction of larceny by trick applied in the principal case to the effect that if the prosecuting witness intended to part with possession but not property and at the moment of delivery the defendant intended to keep the property for himself, the crime was larceny. If, however, the prosecuting witness intended to part with the property, no crime was committed until a statute was passed covering the crime of obtaining property under false pretenses; other fraudulent dealings with property were covered by extending the embezzlement statute.[2]

The boundary line separating these three offenses is often too difficult to ascertain in advance, the State not being in possession of the defendant's evidence. The result is that when the District Attorney has charged one of these crimes, the defendant often secures an acquittal by proving his guilt of one of the others.[3]

There may be some who believe the subtle distinctions in these crimes inherent in the nature of things, but it is submitted that their existence is entirely due to accidental, historical causes, and their perpetuation is a disgrace. The District Attorneys and the California Bar Association framed a bill to permit a conviction for any crime disclosed by the evidence by not requiring the prosecuting attorney to elect the one on which he would go to the jury. This would have remedied the evil, but the more logical and scientific way would be to combine these similar offenses into one crime.[4] Bills to accomplish the purpose in both ways were introduced in the last legislature, but died in committee. Indeed, every measure recommended by the bar association was killed either by the legislature or by the Governor. The public should know where the responsibility lies for the failure to obtain desired improvements in the law.

A. M. K.

NOTARIES: ACKNOWLEDGMENT BY A PARTY IN INTEREST.—It was contended in *First National Bank* v. *Merrill*[1] that an acknowledgment of a mortgage to a bank was invalid because the notary taking it was a stockholder of the bank. The court, however, decided that the notary's interest as a stockholder could not invalidate his action. The decision seemed to turn upon the character of the act of taking an acknowledgment; if a judicial act, it will be adjudged void; if ministerial, it will be considered valid. By the employment of this test, the court has overlooked the fact that a stockholder

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[2] Professor Beale, 6 Harvard Law Review 244.

[3] People v. Delbos, (1905) 146 Cal. 734, 81 Pac. 131, where Abraham Ruef, as attorney for the defendant, worked the trick successfully.

[4] Consolidated Laws of the State of New York, 1909, p. 2696.

[1] (1914) 47 Cal. Dec. 377.